IN THE

SUPREME COURT,

IN BANC.

JANUARY TERM, 1871. NO. 270.

APPEAL OF THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

PAPER-BOOK OF APPELLANTS.

JOHN G. JOHNSON,
Counsel for Appellants.

Collins, Printer, 705 Jayne Street.

In the Supreme Court, for the Eastern District of Pennsylvania.

In the Matter of the Estate of WASHINGTON BROWN, dec'd. Sur Appeal of the PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Trustees of residuary estate, under his Will, from the decree of the Orphans' Court on the Accounts of his Executors.	January Term, 1871. No. 270. Certiorari to Orphans' Court, for the City and County of Philadelphia.

1. *History of the Case.*

Washington Brown, who left a wife and two daughters, Mary S. and Charlotte M., both of age, by his last will and testament, dated 19th June, 1867, bequeathed unto the Pennsylvania Company for Insurances on Lives and Granting Annuities, the sum of $120,000 "as soon as the same can be conveniently raised and paid out of my estate by my executors in trust," after the payment of one-third of the income to his wife, during her life, "to pay and divide the income equally between my said two daughters, for their sole and separate use," during their respective lives, and upon their decease, to pay the principal to such persons as they should, by last will and testament, nominate, or, failing these, to their children, &c.

To his wife and daughters he also gave absolutely, very valuable real and personal property, and the whole residue of his estate.

He nominated as his executors his wife and two daughters.

By a codicil, dated 23d September, 1868, he gave to his wife and to each of his daughters legacies of $5000 apiece, and his house and furniture. He revoked the former bequest of his residuary estate, and gave it to the said company, in trust, to pay its net income in the way and manner he had before directed, of and concerning the $120,000. He appointed as his executors, in place of his former nominees, his wife and the said company.

He died on the 21st day of January, 1869. His wife died in the summer of 1870.

The testator's personal estate, which, after payment of debts, amounted to some $236,000, was at the time of his decease invested in interest-paying securities, and so continued. No distribution was made until after the filing of the auditor's report, which awarded to the children and the executors of the widow, interest, viz., $9165, actually derived from investments as income payable to them, for the year succeeding testator's death, on the $120,000 legacy. To the trustees of the residuary estate, as income on the clear residue, he awarded the balance, viz., $4964. He also awarded interest during the first year, viz., $600, to Esther S. and Fanny W. Hillborn, beneficiaries under the following clause in the said will:—

"I give and bequeath the sum of $10,000 to the said company, in trust, to pay the income of one-half thereof to each of my two nieces, Elizabeth S. and Fanny W. Hillborn, for their respective sole and separate use during life," &c.

Exceptions to these awards were filed, and were dismissed by the Court below.

2. *Report of the Auditor.*

The auditor appointed by the court to audit, settle, and adjust the account of the Pennsylvania Company for Insurance on Lives and Granting Annuities, Executor of the last will and testament of Washington Brown, deceased,

and report distribution of the balance in the hands of the accountant. Respectfully reports:—

The testator died on the 21st day of January, 1869, leaving surviving him, his widow Susan A. Brown and two daughters, Mary S. and Charlotte M., both of full age and unmarried. His will bears date June 19, 1867, and its codicil, September 23d, 1868, and both were duly proven March 16, 1869, and letters testamentary thereunder, the same day granted to the accountant; the widow, who had been named as an executrix, so directing, but retaining her right to act as such at any future time, should she so desire.

Pending the audit the widow died, and by her will, which has been duly proven, her two daughters are made her sole legatees and executrices. It is therefore unnecessary to recapitulate the provisions of the will, which apply to her, so far as any trust for her benefit or life estate is concerned. By its terms an absolute estate in the Arch street residence and its furniture is vested in the two daughters. A legacy of one thousand dollars is bequeathed to Esther Stevenson: and ten thousand dollars is also bequeathed in trust to The Pennsylvania Company for Insurances on Lives and Granting Annuities, to pay the income of one-half thereof to each of the testators, two nieces, Elizabeth S. Hillborn and Fanny W. Hillborn, with provisions for the payment of one half of the capital of this fund on the death of each of them to her children or issue, or if no issue be left by such decedent, then to apply the entire income and principal for the use of the other and her issue in like manner as the original share of such other is limited; should both die without issue surviving, after the death of the survivor, the capital reverts to the estate.

And further, he directs that as soon as conveniently may be, there shall be raised and paid out of his estate to the Pennsylvania Company for Insurances on Lives and Granting Annuities and its successors, the sum of $120,000, to be by it held in trust to pay and divide the income thereof

equally between his two daughters for their separate use, and upon the death of either leaving issue, to pay and divide to and among such children or issue, if more than one, the capital of the share whereof such decedent received the income; and if either die without issue, the capital of the share of the decedent goes to the other upon the same trusts as apply to her original share, or to her issue upon her decease. This trust is coupled with a full and complete power of appointment by will of the whole or any part of the capital of the trust fund as the party so disposing thereof shall receive the income.

All the rest, residue, and remainder is bequeathed, share and share alike, to his wife and two daughters.

The codicil is inartificially drawn. It empowers his executors to sell the Arch Street house, without revoking the absolute devise thereof in the will, while repeating the absolute bequest of the furniture, plate, household goods, etc., appoints the accountant an executor; bequeaths a legacy of $5000 each to his wife and two daughters, and apparently revoking his original disposition of the rest, residue and remainder of his estate, provides as follows: "All the rest, residue, and remainder of my estate I give and bequeath unto the Pennsylvania Company for Insurances on Lives and Granting Annuities, and their successors, as soon as the same can be conveniently raised and paid out of my estate by my executors in trust, to pay the net income thereof to my wife and my two daughters, Mary S. Brown and Charlotte M. Brown, in the same manner and proportions as is described in my will, to which this is a codicil, with the income arising from the sum of $120,000 named therein."

It is claimed that under the codicil, the legal estates in the residue rests in the daughters, because no sufficient trust is, in terms, thereby created. It is certainly faulty, in that it provides no limitation or disposition of the corpus of the fund upon the death of the present beneficiaries, nor does it define the extent of the estate conferred

upon them. It simply provides that the net income shall be paid in the same manner and proportions as is described for the income arising from $120,000. Whether as to the capital of the residue the testator died intestate, or whether it is to follow the limitations and powers of appointment of the other fund, is, in the view of your auditor, a question not now to be decided. Is there, however, sufficient in the words creating the trust to sustain it in favor of the accountant, so that it is entitled to hold as against the claim of the *cestuis que trust*, in the absence of limitations as to remainder and extent of present interest. The doctrine of trusts in Pennsylvania has been the subject of varied judicial construction, but the more recently adjudged cases conclusively establish that when the trustee is charged with active, constant, and continuous duties, such as must necessarily vest the legal estate in him, the use is not executed even although the beneficiaries are *sui juris*. Barnet's Appeal, 10 Wr. 392. The words, to pay over, implying that the trustee shall previously receive, imports such active duties as is required, and the trust is, therefore, a valid and subsisting one. Bacon's Appeal, 7 P. F. S. 504. In Forepaugh *v.* Hughes, 6 P. F. S. 228, between which and the present case there is a parallelism as to defective points, the trust was created by deed, which did not define the extent of the estate conferred upon the beneficiary, nor were there any words of limitation descriptive of her interest, and there was no remainder over, after the termination of the estate, whatever it was, granted to her. But the trust was passive, and when the *cestui que trust* became discovered, the estate was declared to vest absolutely and entirely in her. The words there used gave her a general power of disposal of both principal and income, and enjoined no special duties upon the trustee. The whole law upon this subject is exhaustively discussed by Justice Agnew, in the last reported case of Dodson *v.* Ball, 10 P. F. S. 493, and the distinction still maintained between simple or passive and special or active trusts.

Though, therefore, apparently there are no contingent remainders to be preserved, nor separate uses to support, the legal estate must, for the present, be maintained in the trustee, to enable him to perform the duties devolved upon him by the donor. In fact, by the very terms of the codicil, a complete legal estate is vested in the company without any intention—nor can such be presumed—that it is to be the beneficiary. To, therefore, sustain this for those who are to be equitably benefited thereby, it must vest there for some other purpose, and that purpose he directs shall be to pay the net income to his danghters.

Your auditor, without deciding whether the equitable estate in the *cestuis que trust* is absolute or for life, will award the residue to the accountant, in trust, to pay the net income equally to Mary S. and Charlotte M. Brown, according to the limitations and provisions of the will and codicil.

The accountant has filed with your auditor a supplemental account marked *B*, embracing charges and discharges to the 8th day of October, 1870. It has been examined and found correct, and the balance shown thereby with which the Company is to be surcharged, to wit, the sum of $1710 63 is hereafter properly noted.

Your auditor has had the assets in the hands of the accountant revalued, and at their present market rates and prices they will be hereafter so charged. The increase over the appraisement valuation amounts in all to $8495.

Another question arose for the opinion of your auditor. It is contended that the gross income for the year immediately following testator's death, except upon the ascertained residue, should go for the purpose of accumulation as principal to the residuary estate. That the daughters are not entitled during that year to the income from any other fund than that which accrues upon the residue. Such is not, in the opinion of your auditor, the law in Pennsylvania as settled by the cases of Hillyard's Appeal, 5 W. and S. 30, and Spangler's Estate, 9 Id. 135, where it is held, that

if a sum of money be bequeathed by will, with exceptional instances, such as the intention of the testator, or if he stand *in loco parentis*, and the legatee have no other means of support, the legatee is not entitled to interest for the first year; it is otherwise, however, when the bequest is of an income or annuity. In Hillyard's Appeal the bequest was to the executor, who was made trustee. Here a stranger is made such, and subsequently by the codicil becomes an executor; but your auditor can see no reason why, if a clear legal right belongs to a beneficiary, it should not be as much protected by a stranger, who is to represent him, as if he were compelled to look only to those who had the settlement of the estate. In the will before us, no other intent than that the income legacies for the first year should bear interest, appears to be manifested, unless it be collectable from the phrase, "as soon as the same can be conveniently raised." But the case of Eyre *v.* Golding, 5 Binn. 472, and other authorities cited in Hillyard's Appeal, and reasoning from which the conclusions of Sergeant, J., in delivering the opinion in that cause appear to have been drawn, hold that there is no difference between an immediate bequest of the interest, and a direction to invest and pay out separate from the testator's effects and pay, and the words above quoted are susceptible of no other interpretation than those to invest or separate. The assets of the estate, too, were all interest-bearing securities, and so continued during the entire year. As the legacy of $120,000 and the $10,000 legacy to the Hillborns were of the income only, the same reasoning applies to both.

Your auditor is, therefore, of opinion that the income for the first year, less the interest due on the Hillborn annuity; the interest on the $15,000 legacies to the widow and daughters, and the $1000 to Esther Stevenson, all of which goes to the residue, and the interest to be paid on the claim awarded to the widow's estate, should go to the daughters.

[The amount of income earned by the sum of $120,000 during the year next succeeding the testator's death, was $9165, and that earned by the residue for the same period, $4964. The quota of the interest credited to the $120,000 being larger in proportion than that of the residue, is due to the residuary estate receiving the benefit of the increased value of the securities, and the valuation having been, necessarily, made upon the basis of the original appraisement.

At six per cent. the $120,000 should receive $7200, and the residue as at present valued, $4321 32.]

The executor's account, as settled and adjusted by the auditor, will stand thus:—

Balance to the credit of the estate, as per account filed, in cash,			$23,931	50
And the following investments, as per schedules annexed to the account, and valued and estimated at present market rates, as follows:—				
$10,000	Col. & Ind. R. R. 7 p. ct. bds.,	@ 85,	8,500	00
10,000	War. & Frank. R. R. 7 p. ct. bds.,	84,	8,400	00
3,000	McLean & Elk Land Imp. 6 p. ct.,	80,	2,400	00
10,000	Un. & Log. R. R. 7 p. ct. bds.,	78,	7,800	00
10,000	Pa. & N. Y. R. R. & Can. 7 p. ct. b.,	92,	9,200	00
10,000	Leh. Val. R. R. 6 p. ct. bds.,	96,	9,600	00
10,000	U. S. 6 p. ct. loan, 1881,	113¾,	11,375	00
5,000	U. S. 6 p. ct. loan, 1865,	111¾,	5,587	50
300	shs. Ins. Co. of N. Am.,	29,	8,700	00
50	" Enterprise Ins. Co.,	44,	2,200	00
250	" Minehill & Sch. Hav. R. R.,	51¾,	12,937	50
220	" Phila. & Read. R. R.,	50,	11,000	00
1200	" Leh. Val. R. R.,	58½,	70,200	00
200	" Phila., Germ., & Nor. R. R.,	78,	15,600	00
100	" Phila. Nat. Bank,	163,	16,300	00
300	" Big Black Cr. Imp. Co.,	40,	12,000	00
150	" Coal Ridge Imp. Co.,	5,	750	00

100 shs. Phila. & Erie R. R.,	$26\frac{1}{4}$,	2,625	00
1000 " McKean & Elk Land Imp. Co.,	1,	1,000	00
$5400 2d mtg. do. 6 p. ct. bds.,	70,	3,780	00
100 shs. Howard Hill Co.,		190	00
500 " Ocean Oil Co.,	$\frac{50}{100}$,	250	00
1 " Phila. Library Co.,		25	00
1250 " Slippery Rock Pet. Co.,	no value.		
2000 " New Emp. Iron & Pet. Co.,	"		
1500 " Great Eastern Rock Oil,	"		
14 " Bank of United States,	"		
Bond and mortgage of G. M. Butler on premises, Chelton Hills,		5,000	00
		$249,351	50
The accountant is to be surcharged, as per supplemental account, with cash,		1,710	63
Balance for distribution,		$251,062	13

Distribution.

The net income of the estate from 21st January, 1869, to 21st January, 1870, one year,	$17,565	35
Do. from 21st January, 1870, to Oct. 13, 1870,	9,975	35
Total,	$27,540	70
Amount paid widow and daughters on account,	13,355	00
Balance of income,	$14,185	70
The estate, therefore, as per above exhibit, consists of—		
Principal,	$236,876	43
Income,	14,185	70
	$251,062	13

To be distributed as follows:—

Income.

To Pennsylvania Company for Insurance on Lives and Granting Annuities, trustees of residue for M. S. and C. M. Brown—		
One year's interest on $1000, Stevenson legacy,	$60 00	
One year's interest on $15,000, widow's and daughter's do.,	900 00	
		$960 00
To Esther Stevenson, interest on legacy, $1000, from Jan. 21, 1870, to Oct. 13, 1870, 8 mos. 22 days,		43 67
To Mary S. and Charlotte M. Brown, exec. of S. A. Brown, interest on legacy, $5000, from Jan. 21, 1870, to Oct. 13, 1870, 8 mos. 22 dys.,		218 33
To Mary S. Brown, interest on legacy, $5000, from Jan. 21, 1870, 8 mos. 22 days,		218 33
To Charlotte M. Brown, interest on legacy, $5000, from Jan. 21, 1870, 8 mos. 22 days,		218 33
To E. S. and F. W. Hillborn, one year's income on $10,000, trust legacy, to Jan. 21, 1870,		600 00
To E. S. and F. W. Hillborn, proportion of second year's income on same to October 13, 1870, 8 mos. 22 days,		436 67
To M. S. and C. M. Brown, exec. of Susan A. Brown, dec'd, interest on debt awarded her from Jan. 21, 1869, to Oct. 13, 1870, 1 yr. 8 mos. 22 days,		1,876 18
To Mary S. and Charlotte M. Brown, in their own right, and as executrices of Susan A. Brown, dec'd, the balance of income,		9,614 19
		$14,185 70

Principal.

To Mary S. and Charlotte M. Brown, executrices of Susan A. Brown, dec'd, amount of claim allowed their testatrix,		$18,098 13
Awarded in securities and cash as follows:—		
220 shs. Phila. & Read. R. R., @ $50;	$11,000 00	
700 " McKean & Elk Land Imp. Co., 1,	700 00	
1 " Phila. Library Co.,	25 00	
Cash,	6,373 33	
	$18,098 33	
To U. S. succession and legacy taxes, to be hereafter deducted from respective shares,		2,724 06
To State of Pennsylvania collateral inheritance tax,		550 00
Expenses of audit—		
John G. Johnson, Esq., counsel fee,	$200 00	
Clerk of Orphans' Court,	49 62	
Auditor's fee,	500 00	
Advertising,	6 00	
		755 62
To Pennsylvania Company for Insurance on Lives and Granting Annuities, trustees for Mary S. and Charlotte M. Brown, for specific sum named in the will,	$120,000 00	
Less U. S. succession tax, 1 p. ct.,	1,200 00	
		118,800 00
Awarded in securities and cash as follows:—		
$10,000 Col. & Ind. R. R. 7 per cent. bonds, @ 85,	$8,500 00	
10,000 War. & Frank. R. R. 7 per ct. bonds, @ 84,	8,400 00	
10,000 Un. & Log. R. R. 7 per ct. bonds, @ 78,	7,800 00	

10,000 Pa. & N. Y. R. R. & Can. 7 per ct. bonds, @ 92,	9,200 00	
10,000 Leh. Val. R. R. 6 per cent. bonds, @ 96,	9,600 00	
7,100 U. S. 6's, 1881, @ 113¾,	8,076 25	
5,000 bond and mortgage of G. M. Butler,	5,000 00	
250 shs. Minehill & Sch. Hav. R. R., @ 51¾,	12,937 50	
100 " Phila. Nat. Bank, @ 163,	16,300 00	
563 " Leh. Val. R. R., @ 58½,	32,935 50	
Cash,	50 75	
	$118,800 00	

To Esther Stevenson her legacy of	$1,000 00	
Less U. S. legacy tax, 6 p. ct., $60 00		
" col. inher. tax, 5 " 50 00		
	110 00	
		890 00
To Penna. Co. for Ins. on Lives and Granting Annuities, trustees for E. S. & F. M. Hillborn, their income legacy of	$10,000 00	
Less U. S. legacy tax, 6 p. ct., $600 00		
" col. inher. tax, 5 " 500 00		
	1,100 00	
		8,900 00

Awarded in cash and securities as follows:—

$5000 U. S. 6's, 1865, @ 111¾,	$5,587 50
2900 " " 1881, @ 113¾,	3,298 75
Cash,	13 75
	$8,900 00

To Mary S. and Charlotte M. Brown, executrices of Susan A. Brown, deceased, their testatrix's legacy of	5,000 00

Awarded in cash and securities as follows:—

50 shs. Phila., Germ., & Nor. R. R., @ 78,		$3,900 00
37 " Ins. Co. of N. Am., @ 29,		1,073 00
Cash,		27 00
		$5,000 00
To Mary S. Brown her legacy of		$5,000 00
Less U.S. leg. tax, 1 p. ct.,	$50 00	
" ½ do. on furniture, &c., appraised at $4383,	21 92	
		71 92
		4,928 08

Awarded in cash and securities as follows:—

50 shs. Phila., Germ., & Nor. R. R., @ 78,		$3,900 00
35 " Ins. Co. of N. Am., @ 29,		1,015 00
Cash,		13 08
		$4,928 08
To Charlotte M. Brown her legacy of		$5,000 00
Less U.S. leg. tax, 1 p. ct.,	$50 00	
" ½ do. on furniture,	21 92	
		71 92
		4,928 08

Awarded in cash and securities as follows:—

50 shs. Phila., Germ., & Nor. R. R., @ 78,		$3,900 00
35 " Ins. Co. of N. Am., @ 29,		1,015 00
Cash,		13 08
		$4,928 08

To Pennsylvania Company for Insurance on Lives and Granting Annuities, trustees for Mary S. and Charlotte M. Brown, under the

terms of the will and codicil (*vide* report, *ante*), the residue of the estate, being the sum of $72,022 48

Less U. S. succession tax, 1 p. ct., 720 22

71,302 26

Awarded in cash and securities as follows:—

$3000	McKean & Elk Land Imp. Co. 6 per cent. bonds,	@ 80,	$2,400 00
193 shs.	Ins. Co. of N. Am.,	29,	5,597 00
50 "	Enterprise Ins. Co.,	44,	2,200 00
637 "	Leh. Val. R. R.,	58½,	37,264 50
50 "	Phila., Germ., & Nor. R. R., @ 78,		3,900 00
300 "	Big Black Cr. Imp. Co., @ 40,		12,000 00
150 "	Coal Ridge Imp. Co.,	@ 5,	750 00
100 "	Phila. & Erie R. R.,	26¼,	2,625 00
300 "	McKean & Elk Land Imp., @ 1,		300 00
$5400	2d mort. do., 6 p. ct.,	@ 70,	3,780 00
100 shs.	Howard Hill Co.,		190 00
500 "	Ocean Oil,	@ $\frac{50}{100}$,	250 00
Cash,			45 76
			$71,302 26

And the following securities appraised as of no value:—

1250 shs. Slippery Rock Pet. Co.
2040 " New Empire Iron and Pet. Co.
1500 " Great Eastern Rock Oil.
14 " Bank of United States.

$236,876 43
14,185 70
$251,062 13

All of which is respectfully submitted.

JAMES W. LATTA, *Auditor.*

3. *Exceptions Filed on Behalf of the Pennsylvania Company for Insurances on Lives, &c., Trustees of Residuary Estate, under Will of Testator.*

1. The learned auditor erred in awarding to Mary S. and Charlotte M. Brown, individually, and as executrices, the interest of $9165 on the $120,000 bequeathed to the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees, during the year immediately succeeding the death of testator.

2. The learned auditor erred in refusing to award the interest upon this fund during said time, as an accretion to the principal to the said company as trustees for the residuary estate.

3. The learned auditor erred in awarding to Esther S. and Fanny W. Hillborn interest on the $10,000 bequeathed to the said company, trustees, during the year immediately succeeding the death of testator.

The learned auditor erred in refusing to award the interest upon this fund during said time, as an accretion to the principal to the said company as trustees for the residuary estate.

JOHN G. JOHNSON,
Attorney.

4. *Decree of the Court Below.*

The exceptions were dismissed by the court below, and the Report of the Auditor was confirmed. No opinion was delivered.

5. *Assignments of Error.*

1. The court erred in confirming the report of the auditor.

2. The court erred in dismissing the first exception to the auditor's award to Mary S. and Charlotte M. Brown, individually, and as executrices, of $9,165 income during

the year immediately succeeding testator's death on the $120,000 bequeathed to Pennsylvania Company for Insurance on Lives &c., Trustees.

3. The court erred in dismissing the second exception to the auditor's refusal to award the interest upon this fund during said time, as an accretion to the principal to the trustee for the residuary estate.

4. The court erred in dismissing the third exception to the auditor's award to Esther S. and Fanny W. Hillborn of interest, during the year immediately succeeding testator's decease, on the $10,000 bequeathed to the said company, trustees, &c.

5. The court erred in dismissing the fourth exception to the auditor's refusal to award the interest upon this fund during said time, as an accretion to the principal to the trustee for the residuary estate.

6. *Argument for Appellant.*

All the assignments will be considered together, as they involve substantially the same points. Though the legacy of $10,000 is to nieces, towards whom the testator did not stand "*in loco parentis*," and that of $120,000 is to daughters and wife, there is really no difference in the legal position, inasmuch as his children were not minors, and were abundantly provided for by other bequests in the will, whilst the bequest to the wife was not in lieu of dower.

Before the auditor and in the court below, it was argued for appellees, that the exceptions are merely formal and that the interest earned by the $120,000, though not awarded to the appellees directly, will still go to them indirectly as income if awarded to the trustees of the residuary estate. This, however, did not meet with the approval of the auditor or the court. The appellees can only take the fund as beneficiaries of the bequest of $120,000. If awarded to the residuary estate, it goes as an accretion to the *principal.*

The life tenants of the residuary estate are entitled to its

whole income from the date of testator's decease; but not to the income of anything besides the residue. Assume the case of bequests to the amount of $100,000 in pecuniary legacies to children, and of the residue subsequently ascertained to be, say $10,000, to strangers for life, with remainder to children, would any court hold such strangers entitled to the interest to the extent of $6600 during the first year?

A bequest of a residue for life carries the *income of the residue* only, as ascertained after payment of debts and legacies, not that of the whole estate.

"Where legacies are payable at the end of a year from the testator's death, the legatee of a life interest in the residuary estate, is not entitled to the whole interest on the amount of the general legacies for the first year. But the amount of the residuary estate at the death of the testator, for the purpose of settling the rights of the tenant for life, and the remainder-men, in the residuary fund, must be ascertained by taking from the estate such a sum for the general legacies as would, if invested at the death of the testator, produce the amount of such legacies at the end of the year clear of expense; or by deducting five per cent. from the amount of the general legacies, and adding it to the capital of the residuary estate, and giving to the legatee of the life interest in such residue, the income thereof from the testator's death. "The legatee for life is entitled to the interest or income of the *clear residue*, as afterwards ascertained." Williamson's Estate, 6 Page 298; S. P. Douglas *v.* Convers, 1 Keen 410.

The American rule, as far as it can be ascertained, is, that in the bequest of a life estate in a residuary fund, and where no time is provided in the will for the commencement of interest, or the enjoyment of the use and income of such residue, the legatee for life is entitled to the interest or income of the *clear residue*, as afterwards ascertained, to be computed from the death of the testator. Bird's Estate, 2 Parsons 168.

In the argument it is proposed to consider:—

1. The general rule of law as to the payment of interest during the first year, on a legacy like the present.

2. The extent of any modification of it by Pennsylvania adjudications.

As to the first:—

The rule is, "that unless the testator so orders, interest will *not* be paid during the first year." Williams on Executors *1284; 2 Roper on Legacies 1245.

As before stated, in regard to the established rule in the English courts, it seems to be well settled in the American courts that, as a general thing, the bequest of the interest of a particular sum will not be construed the same as giving an annuity of the same amount, although payable annually; but it will be regarded simply as the gift of the income, or interest of that amount. 2 Redfield on Wills 453.

Where testator directed his executors, as soon as they should think proper, after his decease, to sell as much stock as would produce a legacy of £12,000, the legacy is not payable until the end of the year after testator's death. Benson *v.* Maude, 6 Madd. 17. See also Coggswell *v.* Coggswell, 2 Edw. ch. 231; Elwin *v.* Elwin, 8 Ves. 554.

If an annuity is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till end of two years. It is only interest of the legacy, and till the legacy is payable there is no fund to produce interest. Gibson *v.* Bott, 8 Ves. 89.

The exceptions are only in the cases of widows to whom legacies are given expressly in lieu of dower; of children under age, not otherwise provided for, and of those towards whom testator stood '*in loco parentis*.' 2 Roper on Legacies 1246; Magoffin *v.* Patton, 4 Rawle 119; Martin *v.* Martin, 6 Watts 67.

As to the second point:—

It has been held in Pennsylvania that, if the bequest is

of an annual sum, or of an income, to be paid to the beneficiary, during life by *executors*, interest will be allowed during the first year.

In Eyre *v.* Golding, 5 Binn. 474, where the testator's words were:—

"I give and bequeath unto my daughter Rachel the interest of £400, to be paid her annually during her life, and at her decease I give the same £400 equally between all her children."

C. T. Tilghman said:—

"The devise in the present case is not of a gross sum, but of an annuity. There is a difference between a legacy of a sum of money to one for term of life, and a bequest of a sum to be paid annually for life. In the former case, the legacy not being payable till the end of the year from the testator's death, carries no interest for that year. But, in the latter, the first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with. You must count immediately from his death or the legatee will not receive the amount *annually* during life."

In Hilyard's Estate, 5 W. & S. 30, the testator's words were:—

"I give and bequeath unto my *Executors*, the sum of $10,000 in trust, to put and place the same out at interest on some good security, and pay or apply the interest and income thereof, from time to time, when and as the same shall be got in and received, unto my sister Keziah, for and during the full term of her natural life. And from and immediately after her decease, then I give and bequeath the said sum of $10,000, to be equally divided, share and share alike, between all the children of my late brother," &c.

The Court said:—

"Where a sum of money is left by will, it does not carry interest for a year from testator's death, because the executor is not bound to pay it before the end of the year.

Time is given to collect in, and even if fund is drawing interest, the interest thus running on belongs to the bulk of the estate.

"Where it is not a bequest of a '*corpus*,' but of an income or annuity, then a contrary rule prevails, and the legatee of interest for life has been allowed it from death of testator.

"Interest is, in its nature, an annnal profit, and a direction to pay interest makes it payable annually, without anything further. There certainly can be no difference between an immediate bequest of the interest of £400, as in Eyre *v.* Golding, and a direction to EXECUTORS to invest that sum and pay it. In both cases *they* must have that sum invested, in order to produce the interest."

In Chas. Bird's Estate, 2 Parsons 168, the words were:—

"I give and bequeath unto my executor, hereinafter named, and to his executors and administrators, the sum of $28,000, to be invested in some good and safe security, and held by him for the use of my two daughters, Rebecca and Emma, in equal shares, upon the trusts hereinafter set forth and declared," &c.

It was then held that where the legacy is not of a gross sum, but of an income or annuity, the legatee is entitled to the interest or income for life, from the death of the testator.

There are no other precedents in this State, for Spangler's Estate is upon another point.

Hilyard's Estate was based upon Binney *v.* Seaton, unreported, in which, as Mr. Justice Seargant alleged, "the same principle was decided." I find, in the handwriting of Mr. Henry J. Williams, in his volume of the reports, the following foot note:—

"This is an entire mistake in the learned judge. I was concerned in the case of Binney *v.* Seaton, which was this: Mr. Seaton gave his wife a large sum of money for her use during life, with a general power of appointment. She executed that power in favor of her nephew, J. F. Newton;

but the persons who held this bequest (Mr. Stevenson's executors), paid the income of the fund, *for the year ensuing her death, to her* executors, as part of *her* estate, and Mr. Newton, the appointee, claimed this income as belonging to him. The Court held that the appointee took under Mr. Stevenson's will, which created the power; that Mr. Stevenson's will operated merely as an appointment; that the fund was no part of *her* estate, and that, of course, the income in question belonged to Mr. Newton."

Be this as it may, Hilyard's Estate is far out on the frontier, and the line of cases should not be pushed beyond it. Though its conclusion seems hardly supported by the reasoning, or deducible from the authorities cited, it is not necessary to attack it; for it established no principle which justified the ruling of the auditor or court below, in favor of the appellees.

Our case differs from it in two very important particulars:—

1. The bequest is not of an *income* payable by an *executor*, but of the entire '*corpus*' of the $120,000 to a third person, who, at the making of the will was not an executor.

2. The legacy is not to be paid immediately, but "as soon as the same can be conveniently raised, and paid out of my estate by my executors."

1. In principle how does this case differ from a bequest to the daughters for life, with remainder over, in which, according to Eyre *v.* Golding, and Hilyard's Estate, interest during the first year would not pass? Under Kuhn *v.* Newman, our trust would have been executed, and the daughters would have taken directly. Is the question of *intention* dependent on the activity of the trust? If the legacy were unconditionally for life, unless security were entered, it would be put in the hands of a trustee, who would do precisely what the testator directs, and with the same object—the protection of the remainder—viz: invest and pay over income to the life-tenants. Even if security

were given, nothing more than income would be enjoyable by the latter.

The modification in Pennsylvania extends no further than this: When the *executors* are directed to pay over income, whether after investment or not, and the remainder is to pass on the death of its recipients, no *corpus* is considered as passing until the arrival of the time fixed for the creating in *enjoyment* of the remainder, and the payment of income is regarded as a part of their duty *as executors*. The *cestuis que trust*, take directly from them, and if there is income in hand, our courts, straining legal principles in their favor, infer an intention to give income at once. This can work no harm; for the income need not be actually paid till the quarantine year has expired, and the solvency of the testator has been determined. A decree, however, to pay income where the legacy is to a *third person*, though in trust, would work a revolution almost. The *executor* must not pay the income, for that duty is devolved upon the trustee, to whom alone the beneficiary can look. The trustee cannot pay it unless he earns it, and he can only earn it if the legacy is paid to him immediately upon testator's decease. Will the court, because a *trust* is created, compel payment of a legacy of $120,000 within the year? It can only sustain the claim of the appellee by so doing; for the trustees take, not *income*, but the legal fee in the whole fund, out of which an equitable fee is carved. There is no provision for a return of the amount to the executors when the life estate is spent. On the contrary, a full power of appointment by will is given to the daughters.

Is the inference of an intention that interest shall be payable during the year to be drawn because it turns out that the estate was *productive?* If so, we must, to infer from the will, an intention to give the appellees interest, attribute to the testator the gift of *prescience*, for he has given his executors authority, the security not being to any extent *legal* investments, and in reality a *direction* to convert into cash and render unproductive, the non-execution of which he could

not otherwise have anticipated. If the inference is independent of this state of affairs, we must, where the estate is unproductive, have great injustice worked, as can be shown by a simple illustration. Take the case of a testator leaving an estate of $127,200 in cash, and making legacies of $120,000 in trust. The executors could not and should not pay the $120,000 for a year. Would the trustees then receive $127,200, and the residuaries nothing? Would this be likely to carry out the testamentary intention in bequeathing a residue?

The legal principle which is in the way of the appellees' demand, is an old and well-rooted one. If it is to be broken down in favor of testamentary intention, the intention should be clearly shown to exist. In Eyre *v.* Golding and in Hilyard's Estate, the legatee of the interest was brought face to face with the executors; but here the executors must deal with the trustees, to whom alone the appellees must look for interest. The *trustees* cannot collect it, for, being legatees of the *corpus*, a year for payment is the right of the executors. How then can their *cestuis que trust*, who are to receive the interest upon the fund *after* it has been collected and invested?

2. It is well settled that nothing, not even an annuity, is payable during the first year, if there are words evidencing a contrary intention.

As the appellees can only get what their trustees receive, or ought to receive, they can only demand the first year's income, if the testator made the legacy payable, or intended, as to resulting rights, to make it payable, immediately upon his decease. His words negative an inference of any such an intention. He bequeaths $120,000 "AS SOON AS THE SAME CAN BE CONVENIENTLY RAISED AND PAID OUT OF MY ESTATE BY MY EXECUTORS." His estate was invested in dividend-paying securities, not strictly legal. He did not wish *these* paid over, but directed that the executors should "RAISE" the amount out of his estate, not in kind, but in cash. Can we give the appellees interest earned by

investments which were to be sold before the trustees, through whom they claim, could receive a dollar of the principal which was to produce the income that was given them?

The duty of conversion thus specially impressed upon the executors, was one to be performed with judgment and deliberation. They took a year in which to do it. Was this an unreasonable time?

In Vickers *v.* Scott, 3 Mylre and Keen 500, where the testator directed a sale with all convenient speed after his death, and directed the produce to be invested and the dividends to be paid to one for life, and the land remained unsold, the court considered twelve months as a reasonable time within which the estates ought to have been sold, and the produce invested, and gave to the tenant for life the rents of the unsold estate from that time.

The testator did not direct the money to be paid *immediately*, but as soon as it could be conveniently raised.

It is contended, therefore, that if the time taken by the executors was not an unreasonable one, payment could not be demanded by trustees, or *cestuis que trust*, until it had elapsed.

In conclusion, it is submitted, as a matter about which there can be no doubt, that the auditor could not award the appellees interest at a greater rate than six per cent., as that the difference between this amount, viz., $7200, and that actually allowed, viz., $9465, should have gone to the residuary estate as principal. To this extent, at least, the decree of the court below must be modified.

JOHN G. JOHNSON,
Attorney for Appellants.

APPENDIX.

Copy of Will of Washington Brown, deceased.

Be it remembered that I, Washington Brown, of the city of Philadelphia, do make and declare this to be my last will and testament.

I direct all my just debts and funeral expenses to be paid.

I give and devise unto my dear wife Susan A. Brown during her life, the use, occupation, and enjoyment of my dwelling-house on Arch Street, in the city of Philadelphia, together with all the household furniture, plate pictures, books and articles of domestic use on hand at my decease; and at her decease, I give and bequeath the said dwelling-house lot of ground and furniture, unto my two daughters Mary S. Brown and Charlotte M. Brown, share and share alike, and to their heirs and assigns forever. And if either of my said daughters shall die in the lifetime of her mother without leaving any issue surviving, then the whole thereof after the decease of my said wife, shall go to the survivor her heirs and assigns.

I give and bequeath unto the Pennsylvania Company for Insurances on Lives, &c., and their successors, the sum of $120,000, as soon as the same can be conveniently raised and paid out of my estate by my executors. In trust, to pay the one-third part of the net income thereof unto my said wife during her natural life, and subject to the foregoing provision out of said income for my wife, to pay and divide such income equally between my said two daughters for their sole and separate use, and free

from the control of any husbands they may marry during their respective lives—and if it shall happen that either of my daughters shall die leaving children or issue, then to divide and pay to such children and issue, if more than one, the capital of the share whereof such decedent is directed to receive the income for life, in the same shares and proportions as they would take if such daughter had died possessed thereof intestate. And if either of them shall die leaving no issue, then the capital of the share of such decedent shall go to the other of my daughters if living, upon the same trusts as apply to her original share or to her issue if she be deceased—subject, however, to one-half of the income of such accruing share going to my wife for her life. Provided, however, that I empower each of my said daughters whether covert or sole, to appoint and dispose by will of the whole or any part of the capital of so much of said trust-fund, as she shall receive income upon under the provisions hereof, whether she leave issue or not—the exercise of such power not, however, to interfere in any way with the provisions above made for my said wife.

I give and bequeath to my wife's cousin Esther Stevenson, one thousand dollars.

I give and bequeath the sum of ten thousand dollars to the said company above-named. In trust to pay the income of one-half thereof to each of my two nieces, Elizabeth S. Hillborn and Fanny W. Hillborn for their respective sole and separate use during life. And at the decease of each of them, to pay one-half of the capital thereof to the children and issue of such decedent in the same share, way and manner as they would take the same if such decedent had died intestate, and if such decedent leave no issue, then to apply the income and principal of her share for the use of the other and her issue, in like manner in all respects as is above limited in respect to the original share of such other—and if both of them shall die without issue sur-

viving, then after the death of the survivor, the capital of this legacy to revert to my estate.

All the rest, residue and remainder of my estate I give, devise, and bequeath unto my said wife and two daughters in equal parts and shares, their heirs and assigns forever.

I appoint my said wife Susan A. Brown, and my two daughters Mary S. Brown and Charlotte M. Brown, the executors of this my will, and I empower them to sell and dispose of any of my real estate, and to make good titles therefor to the purchasers, without such purchasers being bound to see to the application of the purchase money. And if it shall happen that I die during the minority of my daughter Charlotte, I appoint her mother guardian of the estate, and during such minority, the two other executors are to act as fully as if they alone were appointed.

In testimony whereof I have hereunto set my hand and seal this nineteenth day of June, A.D. eighteen hundred and sixty-seven (1867).

WASHINGTON BROWN. [SEAL.]

Signed, sealed, published and declared by Washington Brown, the testator above-named, as and for his last will and testament on the day and year above written, in the presence of us, who at his request attest the same as witnesses.

C. H. SMITH.

WM. PENROSE.

Codicil.

I make this codicil to my foregoing will—at the decease of my wife, I empower my executors to sell and dispose of my dwelling-house on Arch Street, in the city of Philadelphia.

At the decease of my wife, I give and bequeath unto my two daughters, Mary S. Brown and Charlotte M. Brown, all my household furniture, plate, pictures, musical instruments, books, and articles of domestic use on hand at the decease of my wife, and if either of my daughters should

die in the lifetime of her mother, then the whole thereof after the decease of my wife shall go to the survivor.

I give and bequeath to my wife, and to each of my two daughters, five thousand dollars each.

All the rest, residue and remainder of my estate I give and bequeath unto the Pennsylvania Company for Insurances on Lives and Granting Annuities and their successors as soon as the same can be conveniently raised and paid out of my estate by my executors, in trust to pay the net income thereof to my wife and my daughters, Mary S. Brown and Charlotte M. Brown, in the same manner and proportions as is described in my will, to which this is a codicil, with the income arising from the sum of one hundred and twenty thousand dollars named therein.

I appoint my said wife Susan A. Brown the executrix, and the Pennsylvania Company for Insurances on Lives and Granting Annuities and their successors, the executors of my will and codicil.

In testimony whereof, I have hereunto set my hand, and seal this twenty-third day of September, A. D. eighteen hundred and sixty-eight (1868).

WASHINGTON BROWN. [SEAL.]

Signed and sealed in presence of us, and declared to be his codicil.

C. H. SMITH.

CHAMLESS SMITH.